No. 2690.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

R. Woodland Gates,

Appellant,

v.

Columbia Knickerbocker Trust Company, a Corporation, Trustee,

Appellee.

APPELLANT'S PETITION FOR REHEARING.

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By.., Deputy Clerk.

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To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

In the opinion of this Honorable Court affirming the order of the District Court, the principal views of the lower court upon the questions under consideration are reiterated and to a great extent adopted.

Judge Farrington based his order upon the determination that Gates, the intervenor, had not brought himself within the Nevada statute providing for attorneys' liens, and therefore had no right to one. In other words, the consideration of the question went only so far as to inquire whether or not there existed a statutory lien. There was no expression at all from

the lower court as to the equitable right of Gates to a lien.

Although upon appeal to this Court, Gates urged that aside from the Nevada statute, his rights were protected by the principles of equity, this Court rather decided the question upon a consideration of his statutory right, as did Judge Farrington. This Court may have felt that the principal question before it, as presented by the record, was the appellant's statutory right. However, the appellant feels now that there is a broader principle applicable to the right which he seeks to enforce, and for that reason he feels constrained to ask this Court to give these principles consideration before its previous judgment becomes final. It is for this reason that this petition for a rehearing is filed, and to simplify its consideration we shall address ourselves only to the question of the right to an equitable lien.

At the threshold, let us remark that this is essentially a bill in equity. The Court will, by the very nature of the proceeding, exercise its equitable jurisdiction and administer justice upon broad principles of equity, without confining itself to statutory limits. In fact, it woud ultimately have been compelled to do so in order to adjudicate the several rights of the different parties. After the title of the property in question vested in the Pacific Reclamation Company, and even before Gates' services were at an end, a court of equity was given possession of the property, with jurisdiction to distribute it according to equity and justice. Therefore, if a party go into that court, demanding rights con-

nected with that property, should not such rights be considered in the light of equity and justice? Courts of chancery were created for the purposes of administering justice where strict, narrow and inadequate laws failed.

> "Unless the statute expressly forbids it, the jurisdiction of equity lies, for the purpose of granting relief under any circumstances."
>
> Pomeroy's Eq. Jur., vol. 1, sec. 279.
> *Greil Bros. Co.* v. *City of Montgomery,* 182 Ala. 291.

> "An equitable lien may also arise in the absence of an express contract, out of general considerations of right and justice, based upon the maxims which lie at the foundation of equitable jurisprudence."
>
> 25 Cyc. 667.

It is useless to cite authorities to sustain the proposition that equity courts have always given a helping hand to attorneys to enable them to recover just compensation for their services.

> "There can be no doubt that from an early period courts have always interfered in securing to attorneys the fruit of their labors, even against their own clients (7 Vin. Abr. 74). This is an equitable interference on the part of the court (12 Mecs. & W., 441). The enforcement of a claim or right on the part of the attorney to ask the intervention of the court for his own protection where he finds there is a probability that his client will deprive him of his costs (L. R. 7 Q. B. 499); for the want of a better word, it is called a 'lien'; but this so-called lien is limited to the funds collected in the particular case in which the services were rendered (12 Fed. 235). This

is the rule followed by all courts, without requiring the sanction of a statute."

Mass. & So. Construction Co. v. *Township,* 48 Fed. 145.

The lower court had full jurisdiction and control over the property and its distribution. For the purpose of declaring an attorney's lien upon this property, the court could consider only broad principles of justice and equity, and could have closed its eyes to any statutory limitation whatever.

"No abridgment of the equity jurisdiction of the state courts by state law would restrict or impair the chancery jurisdiction of the Federal Court sitting in that state."

Payne v. *Hook,* 7 Wall 425, 19 L. ed. 260.
Green v. *Creighton,* 23 How. 90, 16 L. ed. 419.
Holland v. *Challen,* 110 U. S. 15, 28 L. ed. 52, 3 Sup. Crt. Rep. 195.
Gormley v. *Clark,* 134 U. S. 338, 33 L. ed. 909 10 Sup. Crt. Rep. 554.
Bardon v. *Land & River Imp. Co.,* 157 U. S. 327, 39 L. ed. 179, 15 Sup. Crt. Rep. 650.
Rich v. *Braxton,* 158 U. S. 405, 39 L. ed. 1032, 15 Sup. Crt. Rep. 1006.
Smyth v. *Ames,* 169 U. S. 466, 42 L. ed. 819, 18 Sup. Crt. Rep. 418.

A court of equity can exercise jurisdiction over the case, if a more adequate remedy can be thus obtained than in a court of law.

Wylie v. *Cox,* 14 L. ed. 414.

In touching upon the particular question which we here urge, this Court, in its opinion, relied on the remarks of Judge Earl, in *Goodrich* v. *McDonald,*

112 N. Y. 162, 19 N. E. 649. It was there intimated that an attorney could not enforce his lien on a judgment in an equitable action. We submit that such is not the rule applicable to a *charging lien,* such as the one at bar. In a very recent decision of the Circuit Court of Appeals for the Second District, the principle is definitely declared:

> "Apart from statutes, courts of equity recognize an attorney's lien on the judgment secured by him, as courts of common law did not, since possession is not essential to an equitable lien. . . . The two (a retaining lien and a charging lien) are different in their nature, and the rules applicable to the one are not necessarily applicable to the other. An attorney's lien on a judgment is not recognized at common law unless declared by statute, but the lien on the papers is. The reason for that distinction is that the common law only recognizes liens acquired by possession. Courts of equity, however, recognize the lien on the judgment, possession not being essential to an equitable lien."
>
> *Everett etc.* v. *Alpha Portland C. Co.,* 225 Fed. 931.

We think that Judge Earl's remarks in the above mentioned case were applicable only to those liens which involve the question of possession. It is undoubtedly true, as he said, that after the money recovered has been paid to the client, the attorney's lien is gone, and let it be remarked that he is speaking particularly of funds of money and personal property, subject to actual possession by the attorney, but no such general rule exists to the effect that equity cannot interfere to declare a lien where under different cir-

cumstances and exigencies the justice of a particular situation may demand it, no matter what the kind or character of the property in question.

We call the court's attention to the fact that the property in question here has not gone beyond the reach of the lien claimant in the sense that it has gone from the possession and ownership of the client; it is true that the client, Pacific Reclamation Company, has made a mortgage conveyance of the property, in the form of a trust deed, which, however, transferred neither ownership nor possession. For the present purposes, the title of the property is still in the client, and of course any vested rights subsequently acquired by the Columbia Knickerbocker Trust Company will be subsequent to Gates' lien. They can never be heard to say that they had no notice of the lien, because even while holding some imperfect and inchoate rights under the trust deed, they made no objection to the contract of employment of Gates, or the performance by him of his services. Obviously they would not do so. They knew that Gates, by those particular services, was obtaining for their grantor and for their benefit the very property which was the subject of their deed from the Pacific Reclamation Company. In such situations as these, equity has not refused to follow the property, and allow the lien.

> "In equity there is no difficulty in enforcing a lien, or any other equitable claim constituting a charge in *rem,* not only against real estate but upon personal estate, or upon money in the hands of third persons."

Fletcher v. *Morey,* 2 Story 555.

Tuttle v. *Claflin*, 88 Fed. 122.
Needles v. *Smith*, 87 Fed. 316.

Neither does the filing of the Gutman action and the appointment of the receiver therein remove the property from the reach of the lien claimant. But it places it, as we have before suggested, under that control to which Gates must of necessity look in order to obtain his rights.

In its opinion, this Court remarked that appellant had made no showing from which it is to be inferred that it was the purpose of the parties interested to impress a lien of any kind upon the four hundred and eighty acres involved in the proceedings before the Interior Department. For the purposes of equity, are not the allegations of the bill sufficient to show that it was the implied purpose of the parties to create a lien in favor of the attorney? In Paragraph III it is alleged in substance that Gates was employed as attorney for the particular purpose of attending to all of the business of the Company which it might have before the General Land Office, or the Department of Interior, but more especially in regard to certain suits then pending or about to be commenced. It is then alleged, in Paragraph V, that these particular suits involved the securing to the company of the four hundred and eighty acres, and it is finally alleged that continually during his period of employment the attorney was performing professional services, particularly in prosecuting said suits.

Of course, it must be admitted that the allegations of the complaint could have been made more

specific, for the purpose of more definitely showing the intent of the parties. Such a defect as this is subject to a motion to make more certain, which is the proper way to reach it, but to say that on account of such defect the bill does not sufficiently set forth the party's equitable rights, goes beyond the limits of the rules governing proper construction of pleadings.

The court has thoroughly considered the right of the intervenor to a statutory lien. We are satisfied that it has fully advised itself upon this point, and that the decision is correct, but we beg leave by this petition to ask that the court consider the rights of this attorney to his lien according to the rules and principles of equity. We feel that the circumstances of the case, even as set forth in the bill, call for the interposition of a court of equity, so that substantial justice may be done.

Respectfully submitted,

THEODORE A. BELL,
Attorney for Appellant.

Dated: July 8, 1916.

CERTIFICATE OF COUNSEL.

I hereby certify that I am counsel for the appellant and petitioner in the above entitled cause, and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact, and that said petition is not interposed for delay.

THEODORE A. BELL,
Attorney for Appellant and Petitioner.